



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTON
ATTORNEY GENERAL

May 4, 1990

Honorable Jay J. Armes
City Council
City of El Paso
Two Civic Center Plaza
El Paso, Texas 79901-1196

LO-90-21

Dear Mr. Armes:

You ask about the circumstances under which a taxing unit may waive penalty and interest accruing on a delinquent tax account. Specifically, you wish to know whether a taxing unit may waive penalty and interest in an instance in which the taxpayer mailed the tax payment prior to the February 1 delinquent date but the envelope containing the payment was dated February 1. Your question is prompted by a specific set of facts.

You inform us that a business with personal property in El Paso issued a check in the amount of \$1,552,474 in order to pay property taxes in El Paso County and mailed that check on January 31 of this year, before the taxes became delinquent. However, the postmark on the envelope containing the check was dated February 1 of this year, instead of January 31. An employee of the commercial taxpayer who works in the taxpayer's mail room has signed an affidavit stating that she had erred in postmarking the envelope by advancing the date from January 31 to February 1. Nevertheless, the assessor-collector imposed penalty and interest in the amount of \$108,673.20 on the taxes that were delinquent for one day. The taxpayer requested that the penalty and interest be waived in this instance; you inform us that other taxing units receiving payments dated February 1 mailed by this taxpayer have so waived the penalty and interest. You wish to know whether the city council of the City of El Paso may waive the penalty and interest.

Section 33.011 of the Tax Code governs the waiver of penalty and interest accruing on a delinquent tax account and provides the following:

The governing body of a taxing unit may provide for the waiver of penalties and interest on a delinquent tax if an act or omission of an officer, employee, or agent of the taxing unit or the appraisal district in which the taxing unit participates caused or resulted in the taxpayer's failure to pay the tax before delinquency and if the tax is paid within 21 days after the taxpayer knows or should know of the delinquency.

On the basis of the information that you have given us, it does not appear that the taxpayer's failure to tender in a timely fashion the tax owed was caused by "an act or omission of an officer, employee, or agent of the taxing unit or the appraisal district in which the taxing unit participates." Indeed, the taxpayer admits that the failure to tender the taxes on time was caused by an act of his own employee. Therefore, section 33.011 of the code is not applicable in the fact situation that you have described, and the City of El Paso may not waive the accrued penalty and interest. No other provision of the code even arguably permits such a waiver.

We note, though, that while section 33.011 of the code does not provide the taxpayer with a remedy under the facts that you describe, section 1.08 of the code impliedly might do so. Section 1.08 of the Tax Code governs the timeliness of action by mail and provides:

When a property owner is required by this title to make a payment or to file or deliver a report, application, statement, or other document or paper before a specified date, his action is timely if:

(1) it is sent by regular first-class mail, properly addressed with postage prepaid; and

(2) it bears a post office cancellation mark of a date earlier than the specified date and within the specified period or the property owner furnishes satisfactory proof that it was deposited in the mail before the specified date and within the specified period. (Emphasis added.)

It appears that if the taxing units in El Paso County attempt to collect in court the outstanding penalty and interest in the situation that you describe, the taxpayer may defeat the claim if he produces evidence that satisfies a court that the tax payment was deposited in the mail before the February 1 deadline. Whether the affidavit that the taxpayer's employee signed constitutes such sufficient evidence is an issue of fact that cannot be resolved in the opinion process.

Very truly yours,



Jim Moellinger
Assistant Attorney General
Opinion Committee

APPROVED: Rick Gilpin, Chairman
Opinion Committee

Sarah Woelk, Chief
Letter Opinion Section

JM/mc

Ref.:ID# 9470